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IN THE

Supreme Court of the United States

October Term, 1969
No. 386

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 94, AFL-CIO; and AUTOMOTIVE MARINE, PRODUCTION FINISHERS, EQUIPMENT, MAINTENANCE AND PUBLIC SERVICE PAINTERS LOCAL UNION 1798, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD; LOU EHLERS CADILLAC; and THOMAS CADILLAC, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF THOMAS CADILLAC, INC. IN OPPOSITION.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF THOMAS CADILLAC, INC. IN OPPOSITION.

QUESTIONS PRESENTED.

We believe the only question presented is whether the court below correctly held that substantial evidence supports the finding of the Board that upon the cessation of the retail sale of Cadillac automobiles by General Motors Corporation in Los Angeles, California, and the acquisition from General Motors by two independent dealers of competing local Cadillac dealerships, one at

each of the locations in Los Angeles where General Motors formerly sold Cadillacs, the two dealers did not become "successor employers" to General Motors as that term is used in Federal labor jurisprudence, and were therefore not required to assume its obligations with the two unions with whom it had a collective bargaining agreement.

Petitioners have stated the question presented to be a very different one, quite independent of the doctrine of successorship:

> "Whether Section 8(a)(5) imposes the duty upon the purchaser of a business to negotiate with the certified bargaining agent as to the retention of all or some of the seller's employees on the payroll?" (Pet. 2).[1]

We do not believe the latter question is properly before the Court because it was neither made an issue in the Complaint, nor litigated before either the Board or the court below.

STATEMENT.

As of the early part of 1965, General Motors Corporation maintained a branch of its Cadillac Motor Car Division in Los Angeles, consisting of two retail sales outlets (established in 1949 and 1954, respectively) for the sale of Cadillac motor vehicles, parts and accessories, and the servicing of such vehicles, one at the intersection of 7th and Bixel Streets ("Bixel") and one at 5151 Wilshire Boulevard ("Wilshire") [A. 214, 207, 215]. A used car lot at 501 So. Vermont Avenue

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[1] "Pet" herein refers to "Petition for Writ of Certiorari"; "A" to the printed "Appendix of the Parties"; "R" to "Official Report of Proceedings before the National Labor Relations Board."

("Vermont") was also maintained as a part of said branch [R. 255; A. 22].

Commencing in 1957, General Motors entered into a succession of collective bargaining agreements with unions—petitioners Machinists[2] and Painters—representing the employees of such Los Angeles branch [A. 1025-72, 948-9, 952-3]. Since 1958, each agreement had been with both unions. As of 1965, the current agreement had been executed December 1, 1964 [A. 577-636]. It provided that it would remain in effect until December 1, 1967, and thereafter until notification was given by either party. The agreement contained no provision making it binding on successors and assigns of General Motors or purchasers of its assets [R. 242].

Commencing in March, 1965, General Motors had conversations wih two individuals, La Rue Thomas and Lou Ehlers, which culminated in May and June, 1965, in the discontinuance by General Motors of its sales and service operations at Bixel, Wilshire, and Vermont, and the acquisition of independent and competing Cadillac dealerships at Bixel and Wilshire, respectively, by respondents Thomas Cadillac, Inc. and Lou Ehlers Cadillac (which are corporations formed by said La Rue Thomas and Lou Ehlers) [A. 238, 841-2, 843, 425]. The used car lot at Vermont was discontinued.

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[2]Abbreviations used herein: Petitioner International Association of Machinists, District Lodge 94-AFL-CIO ("Machinists"); Petitioner Automotive Marine, Production Finishers, Equipment, Maintenance and Public Service Painters, Local Union 1798, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO ("Painters"); Respondent National Labor Relations Board ("the Board"); Respondent Lou Ehlers Cadillac ("Ehlers"); Respondent Thomas Cadillac, Inc. ("Thomas").

Labor Relations Aspects of the Transfer to Thomas.

Commencing in January, 1965, General Motors notified the unions that it was reconsidering its policy of operating its own Cadillac agencies and was contemplating the transfer of its Bixel and Wilshire branches to independent dealers [A. 959-60]. In anticipation of such transfer, on April 28, 1965, a supplement to said collective bargaining agreement was executed by General Motors and the unions permitting hourly employees to "waive their seniority rights and take a lay-off out of line of seniority under the seniority provisions of the existing agreement" if their services were no longer needed at the Cadillac Motor Car Division, Los Angeles Branch [A. 973-4, 640-1].

General Motors kept the unions advised of its negotiations and of the arrangements which it arrived at with Thomas and Ehlers [A. 1077-80, 1081].

Although not requested by Thomas to do so, on May 28, 1965, General Motors terminated all of its employees at both branches [A. 143, 995].

Thomas thereafter hired its own employees solely on the basis of ability and without reference to whether or not they belonged to unions, or whether or not they had been General Motors' employees [A. 267, 279, 801, 278].

As stated by the Board in its opinion:

> ". . . Moreover, it is clear that both Thomas and Ehlers selected their employees herein involved on the basis of skill and ability, and were in no way influenced by union membership of the job applicant . . ." (Pet. Appx. B, p. 19).

Prior to May 28, 1965, General Motors employed 75 persons at Bixel, covered by the collective bargaining

agreement; Thomas hired 63 employees in such categories, 16 of whom had been General Motors employees [A. 717-9, 878, 259]. Out of 21 supervisory employees hired by Thomas, 7 had worked for General Motors—5 in the same capacity as they had worked for that firm, and 2 in different capacities [A. 1114, 243-5].

The unions wrote Thomas requesting that it meet with their representatives, and also that it arbitrate whether or not it was bound under the terms of the agreement between General Motors and the unions [A. 719, 722, 723, 725]. It did not respond to these requests, having been advised by its labor consultant that it was not obligated to do so [R. 87; A. 262].

Contrast of Operations at Bixel Under General Motors and Under Thomas.

Before the transfer, the Los Angeles branch of the Cadillac Motor Car Division of General Motors was essentially a portion of an *international* business, numerous aspects of which, including the negotiation of its collective bargaining agreements, were handled by personnel of its headquarters in Detroit, Michigan; these included: given orders to the general manager of the Los Angeles branch, approving major expenditures and capital improvements, placing insurance, employing attorneys, handling new car advertisements, payment of the top management employees of Bixel [A. 936; R. 148; A. 209, 217 218, 219]. General Motors' collective bargaining agreement had many national aspects—it included GM's national pension plan, insurance program, and income security plan, and under it various benefits were based on employment in any General Motors plant anywhere (Pet. Ex. B, pp. 22-23).

After the transfer, the two businesses were entirely local in character, not only as to ownership and management, but with reference to all aspects of the day-to-day operations engaged in; Thomas did not purchase any goodwill, customer lists, trade secrets, or tangible assets; in all tax, license, and insurance matters, with both state and federal governments, Thomas was treated as a wholly new business [A. 224, 234, 840, 885, 147-50, 262-3, 174-5; R. 250].

Before the transfer, the Los Angeles branch of the Cadillac Motor Car Division of General Motors Corporation was for most purposes a single unit, consisting of Bixel, Wilshire, and Vermont [A. 940]. Indeed, Wilshire was classified by General Motors as a sub-branch of Bixel [A. 299]. Both stores operated under a common name, were in the charge of a single general manager, (who was also in charge of two San Francisco stores), and nearly all of the paperwork, including financial statements, accounts receivable and payable, purchasing, credit, payroll, vacations, personnel files, and stock savings plans, for both stores were administered at Bixel [A. 207-11, 226-7, 330]. Parts, accessories, and used cars were exchanged and interchanged between the various locations, and salesmen from one location would frequently take customers to see cars at other locations [A. 214, 299, 297, 225-6, 298-9, 220-1].

After the transfer, Thomas, at the former Bixel location, and Ehlers, at the former Wilshire location, were not only independent of each other (as well as of General Motors) but were in direct competition with each other, as well as with all other Cadillac dealers in the geographic area [R. 201, 200, 437].

Proceedings Below.

Painters and Machinists each filed charges against Thomas on June 3 and 4, 1965, respectively [A. 324-5, 331-2]. Each filed amended charges on November 17, 1965 [A. 329-31, 333-5].

A consolidated complaint against Thomas and Ehlers was issued by the General Counsel on November 30, 1965 [A. 339-57; 10]. Therein Thomas was charged with unfair labor practices in refusing to bargain collectively with Painters and Machinists [A. 355] and interfering, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, in violation of Section 8(a)(1) and (5) of the Act [A. 356].

The cause was heard before the Trial Examiner on February 23, 24, 25, and 28, 1966 [A. 10].

The Trial Examiner's Decision, rendered May 17, 1966, found, among other things, that Thomas and Ehlers were "successor employers" to General Motors (Pet. Appx. C, 39-43), and in his Recommended Order proposed that Thomas and Ehlers should be required, among other things, to honor and give effect to the December 1, 1964, collective bargaining agreement between General Motors and the unions (Pet. Appx. C, 62-3).

Various objections thereto were filed by Thomas [A. 63-87].

The Board found that Thomas and Ehlers were not "successors" to General Motors, and on that sole ground, without considering any other objections raised by Thomas or Ehlers, dismissed the complaint (Pet. Appx. B, 15-20).

The unions filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. Thomas' motion to intervene was granted by that court. (Cf. *International Union, Local 283 v. Scofield,* (1965) 382 U.S. 205).

The Court of Appeals denied the petition, holding that the Board's determination that Thomas and Ehlers were not successors to General Motors was supported by substantial evidence (Pet. Appx. A, 1-7).

SUMMARY OF ARGUMENT.

The only question properly presented in the present case—the propriety of the Board's finding that Thomas did not violate the NLRA because it is not a "successor" to General Motors—is, as the court below found, amply supported by substantial evidence, which establishes that the nature of Thomas' business is substantially different in numerous respects from that of its predecessor, General Motors.

The new question which petitioners seek to raise for the first time—whether the purchaser of a business has a duty to negotiate with the certified bargaining agent as to the retention of some or all of the seller's employees—was not presented by the pleadings, and was not litigated before either the Board or the court below. Petitioners' contention that the decision of the court below conflicts with federal court decisions upon which petitioners rely is equally devoid of merit—none of those decisions involve the question in any way.

ARGUMENT.

I.

The Question Presented by Petitioners States No Ground for Review by This Court.

Petitioners state that the "Question Presented" is

> "Whether Section 8(a)(5) imposes the duty upon the purchaser of a business to negotiate with the certified bargaining agent as to the retention of all or some of the seller's employees on the payroll." (Pet. 2).

This presents no proper question for review by this Court for each of the following reasons:

A. The Question Has Not Been Presented or Litigated Below.

Petitioners contend that the above question was presented by the Complaint on which the case was tried (Pet. 20) and that the question was actually litigated (Pet. 21).

The facts are to the contrary.

In the Consolidated Complaint, issued November 30, 1965, on which the case was tried below, it was alleged:

> "Cadillac Motor Car Division, General Motors Corporation, Los Angeles Branch, herein called Cadillac, prior to June 1, 1965, opearated two retail Cadillac sales and service agencies, to wit, one located at 5151 Wilshire Boulevard, and one located at 1076 West Seventh Street, both in Los Angeles, California [A. 342-3].
>
> "Respondent Thomas is, and has been since on or about June 1, 1965, the successor to Cadillac at Cadillac's location at 1076 West Seventh Street, Los Angeles, for the purposes of the Act." [A. 345].

Therein Thomas was charged with unfair labor practices in refusing to bargain collectively with Painters and Machinists, and interfering, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act [A. 355, 356].

Nowheres in the Complaint is the question to which petitioners refer stated.

As stated in the concurring opinion in the Court of Appeals:

> "In this particular case the General Counsel's complaint did not charge a failure to bargain over the limited issue of continuation of employment for the General Motors' employees. Rather it charged broadside that the new employers failed to recognize and bargain with the unions, as representatives of the newly constituted employee units of the new enterprises, with respect to hours, wages, and other terms of employment.
>
> "This is an entirely different matter from bargaining with a union over issues involved in constituting the new work force." (Pet Appx. A, p. 13).

In support of their contention that the question is presented by the Complaint, petitioners refer to certain paragraphs therein (Pet. 20-1). We quote these paragraphs in full:

> "23. Since on or about May 17, 1965, and thereafter, the IAM has requested, and continues to request, that Respondent Thomas bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective-bargaining

representative of the employees of Respondent Thomas in the unit described in paragraph 19 above [A. 350].

"39. Since on or about May 17, 1965, and at all times thereafter, Respondent Thomas has refused, and continues to refuse, to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, with the Painters Union as the exclusive collective-bargaining representative of its employees in the appropriate unit described in paragraph 31 above." [A. 354].

Petitioners emphasize the words *and conditions of employment* in the foregoing paragraphs (Pet. 20).

We are unable to understand how these words can be stretched to mean "retention of all or some of the seller's employees on the payroll."

Certainly that is not the ordinary meaning of the words "conditions of employment."

We believe the meaning of these words is too clear to require construction, but application of the conventional rules of *ejusdem generis* and *noscitur a sociis* further establishes that the meaning sought by petitioners cannot be ascribed to these words.

In *United States v. Salen,* (1914) 235 U.S. 237, 249, this Court said:

"Such an interpretation . . . would ignore the fact that the meaning of the words is affected by their context, and violates the settled rule that words which, standing alone, might have a wide and comprehensive import, will, when joined with those defining specific acts, be interpreted in their nar-

> rower sense, and understood to refer to things of the same nature as those described in the associated list, enumeration, or class."

And, in *Wharton v. Wise,* (1894) 153 U.S. 155, 169, quoting from *Virginia v. Tennessee,* (1893) 148 U.S. 503, 519, it was said:

> "'*Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.'"

Petitioners further contend that the question was actually litigated before the Board, and that under the case law "so long as a matter is litigated at the hearing and a party is not surprised, the fact that a Board order is at variance with a complaint is not a ground for declaring it invalid," citing *NLRB v. Fant Milling Co.,* (1959) 360 U.S. 301; *National Licorice Co. v. NLRB,* (1940) 309 U.S. 350, and *NLRB v. Kiekhaefer,* 7 Cir. (1961) 292 F. 2d 130[3] (Pet. 21).

In support of their contention that "this issue was fully litigated before the Trial Examiner" (Pet. 21) petitioners refer only to four letters written to Thomas by counsel for petitioners between May 17, 1965 and June 9, 1965, which were introduced in evidence as

[3]The actual holdings in these three cases was that the Board, in formulating or amending a complaint, may take cognizance of matters occurring subsequent to the filing of the charge, which grew out of and were continuations of the conduct alleged in the charge.

exhibits before the Trial Examiner (Pet. 21; A. 719, 722, 723, 725), and to five letters between attorneys for petitioners and Ehlers and its attorneys (Pet. 21).

These letters do not substantiate petitioners' contention in any way.

The letters to Thomas (1) request a meeting with Thomas [A. 720, 722]; (2) request Thomas to arbitrate whether it is bound by General Motors' contract with petitioners [A. 723, 725]; and (3) assert Painters' contention that Thomas is in violation of that contract [A. 725].

The question which petitioners now seek to raise was not mentioned therein.

Nor was the question raised elsewhere in the course of the proceedings before the Trial Examiner.

However, in his closing argument at said proceedings, counsel for petitioners used the word "successor" or "successorship" 23 times [R. 544-65]. He said, in part:

> "I think the question is, is there a successorship? Does the contract apply? We hold the contract applies per se." [R. 548].

In the Trial Examiner's Decision (Pet. Appx. C, pp. 24-64), the first of his four Concluding Findings related to the question of whether or not Thomas and Ehlers were "successors" to General Motors.

His finding in this regard commences:

> "First: The General Counsel contends that each Respondent is 'the successor, pro tanto,' of General Motors and obligated to recognize and bargain with the Unions. The crucial question in this re-

gard is 'whether the employing industry remains essentially the same after the transfer of ownership.' N.L.R.B. v. Auto Ventshade, Inc., 276 F. 2d 303 (C.A. 5)." (Pet. Appx. C, p. 39).

After an extended discussion of the question, occupying four printed pages (Pet. Appx. C, pp. 39-43), in the course of which he cited more than a dozen cases relating to the subject, the Examiner found that Thomas and Ehlers were "successors" to General Motors.

His other findings were:

2. By withdrawing recognition during the term of the contract, repudiating it, and unilaterally changing working conditions, Thomas and Ehlers violated Sections 8(a)(5) and 8(d) of the Act (Pet. Appx. C, pp. 43-50).

3. The multi-establishment units of Thomas and Ehlers continued as appropriate units for collective bargaining after the transfer to them and they were bound to bargain collectively and jointly with the unions in such unit (Pet. Appx. C, pp. 50-53).

4. Thomas' and Ehlers' defense of good faith doubt as to the unions' majority status was not well taken (Pet. Appx. C. pp. 53-58).

None of his findings in any way relate to the question petitioners now seek to raise.

In its brief in support of exceptions to the Trial Examiner's decision, Thomas argued, as one of its grounds, that it was not a "successor" to General Motors [A. 71, 82-5].[4]

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[4]It also argued four other grounds:

(a) That Thomas at all times had a good faith doubt that the unions represented a majority of the employees at Thomas Cadillac [A. 71, 75-6].

On May 17, 1966, the Board rendered its decision and its order dismissing the complaint in its entirety.

In its majority opinion, the Board referred to the Trial Examiner's finding that Thomas and Ehlers were successors to General Motors and were required to recognize and bargain with Painters and Machinists (Pet. Appx. B, p. 15), and to Thomas' and Ehlers' contentions that they were not such successors (Pet. Appx. B, p. 16); and after reviewing the evidence and pointing out what it regarded as significant, the Board found that Thomas and Ehlers were not successors to General Motors and therefore "had no obligation to bargain with the Unions with respect to terms and conditions of employment of employees formerly employed by G.M., or with respect to those employees whom they hired after taking over the separate dealer franchises" (Pet. Appx. B, p. 19). It therefore held that Thomas and Ehlers had not violated Section 8(a)(1) and (5) of the Act and ordered the complaint dismissed.

The concurring opinion stated:

> "I agree with my colleagues that the complaint in this case should be dismissed. I also agree with their conclusion that neither Thomas nor Ehlers

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(b) That the industry units which the unions sought to represent were not appropriate units for collective bargaining in the industry involved [A. 71, 76-8].

(c) That the demands made by the unions constituted only a demand that Thomas recognize or bind itself to the contract hitherto entered into between General Motors and the unions (which demand was followed by an action seeking that relief brought in the Superior Court in the State of California for the City of Los Angeles) [A. 70-1].

(d) That as a matter of contract law, Thomas did not become bound by the provisions of the contract between General Motors and the unions [A. 71, 82].

is a successor employer to the original General Motors retail enterprise at the Bixel and Wilshire locations in Los Angeles, California." (Pet. Appx. B, p. 21).

No question other than the successorship question was discussed in either the majority or the concurring opinion.

In "Petitioners' Brief" filed in the United States Court of Appeals for the District of Columbia Circuit, in which petitioners sought review of the foregoing order of the Board, petitioners stated that the issue was:

> "Whether the board properly reversed the Trial Examiner and dismissed the complaint which alleged that the intervenor Thomas Cadillac, Inc., *was a successor* to Cadillac Motor Car Division, Los Angeles Branch, General Motors Corporation, violated Section 8(a) (5) and (1) of the Act by refusing to bargain with petitioners." (P. 1; emphasis added).

Quite properly, the Court of Appeals ruled only on the question of successorship on which the Board had rested its decision (Pet. Appx. A, p. 1 *et seq.*).

In view of the foregoing, we cannot agree with petitioners' contention that the question was either presented by the Complaint or was actually litigated.

B. There Is No Conflict of Decision on the Point.

Petitioners contend that the decision of the Court of Appeals on the question they now seek to raise was "in conflict with applicable decisions of this Court and of the Second, Third, and Ninth Circuits" (Pet. 23).

But the Court of Appeals in this case did not decide the question petitioners now seek to raise.

Nor did any of the decisions of this Court and of the Courts of the Second, Third, and Ninth Circuit on which petitioners rely even remotely relate to the question which petitioners now seek to assert:

In *Fibreboard Paper Products Corp. v. NLRB*, (1964) 379 U.S. 203 (Pet. 15) it was held that an employer had violated the NLRA by refusing to bargain with a union representing certain of its employees about whether it would let an independent contractor perform certain operations which up to that time had been performed by those employees.

In *NLRB v. Erie Resistor Corp.*, (1963) 373 U.S. 221 (Pet. 15) it was held that an employer committed an unfair labor practice by awarding 20 years additional seniority credit for future layoffs to strike replacements and strikers who returned to work before the strike ended.

In *NLRB v. Fleetwood Trailer Co.*, (1967) 389 U.S. 375 (Pet. 16) it was held that an employer was guilty of an unfair labor practice where, four months after a strike, it hired 6 new employees for jobs which 6 strikers were qualified to fill who had applied for reinstatement after the strike but had been rejected because no jobs were then available, and who had not obtained other regular and substantially equivalent employment.

In *Railroad Telegraphers v. Chicago & N. W. Railway Co.*, (1960) 362 U.S. 330 (Pet. 23) it was held that where a railroad planned to abolish certain inefficient stations, and the Union threatened to strike to en-

force its demand that the existing agreement between the Railroad and the Union should be amended by adding a provision that no existing position should be abolished without the consent of the Union, a "labor dispute" existed, hence the injunction of the strike was prohibited under the Norris-La Guardia Act.

In *Cooper Thermometer Co. v. NLRB,* 2 Cir., (1967) 376 F. 2d 684 (Pet. 15) where an employer established a new plant, 27 miles away from the old, it was held that it must make an offer of preferential reinstatement to the employees of the old plant.

In *NLRB v. Royal Plating and Polishing Co.,* 3 Cir., (1965) 350 F. 2d 191 (Pet 16), it was held that the record was inadequate to determine whether the withholding by the employer from the union of information relative to its intention to close part of its business for economic reasons, and thereby preventing bargaining on issues presented by the shut-down, constituted a refusal to bargain and an unfair labor practice.

In *K.B. & J. Young Supermarkets v. NLRB,* 9 Cir., (1967) 377 F. 2d 463, *cert. den.,* 389 U.S. 841 (Pet. 18-19), the purchaser of three markets from a large grocery chain caused the mass discharge of the employees for anti-union reasons just prior to the sale. Reinstatement of back-pay for discharged personnel and recognition of the union for bargaining purposes was ordered.

The foregoing cases may illustrate the generality that employees have an important interest in their jobs (a proposition hardly requiring the elaborate citation of cases which it has been given by petitioners).

They have nothing whatever to do with the specific question which petitioners seek to raise here.

This is likewise true of the case of *Westinghouse Electric Corp.*, (1965) 150 NLRB 1574 (Pet. 16) holding that where the employer had previously let thousands of subcontracts, and there was no provision relating thereto in the collective bargaining agreement, the employer had no duty to notify and consult with the union before letting an additional subcontract which did not eliminate any jobs.

Petitioners here, as in the court below, continue to rely upon the decision of the Board in *Chemrock Corp.*, (1965) 151 NLRB 1074 (Pet. 19).

The inapplicability of the holding here has been pointed out by both Ehlers (Brief in Opp. 28-29) and the Board (Brief in Opp. 7-8).

We would add that if in fact the holding in *Chemrock* had been contrary to the decision of the Board in the present case, it would have *ipso facto* been overruled. See *Gordon: Legal Questions of Successorship*, (1969) 3 Ga. Law Rev. 280, 289-91.

The fact that the Board did not mention the earlier case in its decision below is immaterial.

In *Asher v. Texas,* (1888) 128 U.S. 129, 132, this Court said:

> "Even if it were true that the decision referred to was not in harmony with some of the previous decisions, we had supposed that a later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented on or not."

In *Tallakson Ford, Inc.,* (1968) 171 NLRB No. 67, 68 LRRM 1136, a decision of the Board subsequent to its decision in the present case, a Ford dealer with a collective bargaining agreement sold his business to a purchaser who acquired a franchise from Ford Motor Co. effective the day after the termination of the seller's franchise. The bargaining unit consisted of 9 salesmen.

The purchaser acquired nearly all of the seller's 50 nonsales personnel, but only 3 of its 9 salesmen. The new salesmen were employed without regard to union considerations.

It was held that the purchaser was not a successor, and was not obligated to bargain with the union.

As a supporting authority, the Board cited its decision in the present case.

C. No Important Question of Federal Law Is Presented.

Petitioners make the bare statement that "an important question of Federal law is presented" in the Conclusion of their Petition (Pet. 23), but give no reasons why they contend that this is so to which reply can be made.

The relationship of the question to the NLRA has been discussed at length by Ehlers (Brief in Opp. 31 *et seq.*). We shall not discuss it here.

II.

The Affirmance by the Court of Appeals of the Board's Holding That Thomas Was Not a "Successor" to General Motors Presents No Ground for Review by This Court.

At common law, the purchaser of a business, at least unless otherwise provided in either the collective bargaining agreement or the contract of purchase and sale, is not bound by the collective bargaining contract of the seller.

> *International Longshoremens Union v. Juneau Spruce Corp.*, 9 Cir. (1951) 189 F. 2d 177 (aff'd on other grounds 342 U.S. 237).

Where the question has arisen under the National Labor Relations Act:

> "The courts and the National Labor Relations Board have developed and applied a successorship doctrine based on the employment relationship—a concept which, of course, is unique to labor law." (*Walker Bros.*, 41 Lab. Arb. 844, 848-9 (1963).

As stated by counsel for petitioners in his argument before the Trial Examiner:

> "In general I think we are aware by now the body of law, that is Board law and Court law, that is built up upon the question" [R. 545].

The essence of the doctrine of successorship is that where a purchaser is held to be a "successor" to the seller, he is held to be bound by the obligations of the seller towards the seller's employees.[5]

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[5]A similar doctrine was also applied by the War Labor Board during World War II. *Reagan: The contractual obligations of a successor employer under the collective bargaining agreement of a predecessor,* 113 Univ. of Penn. Law Rev. 914, 920-1 (1965).

There have been scores of judicial decisions, and an even larger number of NLRB decisions, involving under what circumstances a purchaser does or not become a "successor."

In *NLRB v. Auto Ventshade, Inc.*, (5 Cir.) 276 F. 2d 303, 304 (1960) the court said:

> "The crucial question in determining if the certification is binding on the successor is *whether the employing industry remains essentially the same* after the transfer of ownership." (emphasis added).

In *Forkosch: A Treatise on Labor Law*, (2nd ed., 1965) 623 it is stated:

> "In general, it may be said that this successor duty to bargain seems to depend upon *whether the appropriate unit, and the business operation, retain their former respective characters* under the new ownership." (emphasis added).

(The same or a similar doctrine was recognized by this Court in *Wiley v. Livingston*, 376 U.S. 543, 551 (1964) in holding that, in an action under section 301 of the Labor Management Relations Act, where a transferee did become a "successor employer" it was bound under the arbitration clause of the transferor's collective bargaining agreement to arbitrate with the union regarding what rights of the employees set forth in the contract survived the transfer and the expiration of the contract. See *The Successor Employer's Duty to Arbitrate: A Reconsideration of John Wiley & Sons Inc. v. Livingston*, 82 Harv. Law Rev. 418, 428-9 (1968).

The criteria for determination of when the purchaser of a business does or does not become a "successor" to the seller have been summarized in *Sangerman: The labor obligations of the successor to a unionized business* (1968), 19 Labor Law Journal 160, 163:

> "Successorship is primarily a factual question. The following are a number of factors which may be determinative of successor status: (1) whether a going business, or merely assets are transferred; (2) whether there is a continuity of ownership interest between the transferor and transferee; (3) whether the nature of the business remains the same; (4) the number of employees assumed by the acquiring company; (5) whether the business remains at the same location; (6) whether there is evidence of an intent to avoid dealing with the union; (7) the point of time of the transfer in relation to the certification of the union; and (8) the retention of supervisory personnel."

Similar enumerations of factors are set forth in other authorities:

Reagan: The contractual obligations of a successor employer under the collective bargaining agreement of a predecessor, 113 Univ. of Penn. Law Rev. 914, 922 (1965);

Moss: Purchase of a business, 43, Calif. State Bar Journal 387, 389 (1968);

Maddux: Labor law implications in the sale, transfer or discontinuance of all or part of a business operation, 18 Business Law Rev. 819, 835-6 (1963).

Absence of "Successorship" in the Present Case.

Applying the above-mentioned criteria to the present case, it is apparent that the evidence overwhelmingly supports the decisions below holding that there was no successorship.

The nature of the business was basically changed from an operation by General Motors, the world's largest corporation, the major aspects of which were supervised by its head office in Detroit, to a small, independent, locally owned operation, which purchased no good will, customer lists, or trade secrets from General Motors [A. 936].

In this respect the case closely resembles *NLRB v. Alamo White Truck Service, Inc.*, 5 Cir., 273 F. 2d 238 (1959) where White Motor Company, a major truck manufacturer whose head office was in Cleveland, closed its San Antonio, Texas branch, and entered into a local retail dealership agreement with Alamo, a company established by two of its principal employees in the former San Antonio branch.

In holding that there was no successorship, the court said:

> "As the trial examiner pointed out, 'not only the business but the functions changed.' The branch was controlled entirely from Cleveland, Ohio. All policies were determined at the home office of the White Motor Company in Cleveland and centered around the fact that the company was engaged in manufacturing trucks and selling trucks on a nation-wide scale. The policies were transmitted to the branch manager through a White vice-president and the regional director. On the other hand,

with Alamo, control of policy is vested in the officers and directors of a small, independent business . . .

"The difference in the nature of the business and in the functions is of material importance in determining the employee-employer relationship. During the time the branch in San Antonio was in operation all White's labor policies were determined in Cleveland; local White employees received their instructions and were 'placed under' R. C. Crotty, a labor relations director with his head office in Cleveland. Thus, at the time of the hearing in the representation case, Mr. Crotty was in San Antonio and instructed Cregor, the branch manager, exactly what to do. The branch manager had no discretion or independence in the matter; he carried out instructions he received from the labor relations director in Cleveland. The same thing was true with reference to sales policies, purchase policies, and all other important matters. Although no large company fails to consider local conditions, there is a substantial difference, in general and in this case, between the policies and operations of a large, nationwide organization and those of a small local business." (pp. 241-2).

In the present case, there is an additional factor making it an even stronger case than *Alamo*—the new local business is not one, but two—which are in competition with each other.

In this respect the case resembles *International Association of Machinists v. Pivot Punch Corp.*, 34 Misc. 2d 645, 229 N.Y.S. 2d 476 (1962) where, in settlement

of litigation between two owners of a corporation, two new corporations, the King Corporation and the Kopczynski Corporation, were formed, each of which received part of the assets of the old corporation. It was held that the King Corporation was not a successor to the predecessor corporation.

After June 1, 1965, there was no continuity of ownership—General Motors, Thomas, and Ehlers were all independent [A. 234, 224, 885, 161-2].

Thomas acquired no goodwill, trade name, or customer lists from General Motors—it acquired its own list of prospective purchasers from another independent source [A. 147, 150, 260; R. 158-9].

The Court of Appeals has referred to the "substantial non-discriminatory change in personnel found by the Board" (Pet. Appx. A, p. 7), which we have discussed in our Statement.[6] In this respect the facts were similar to those in *NLRB v. John Stepp's Friendly Ford, Inc.*, (9 Cir.) 338 F. 2d 833 (1964) involving the sale of the business of a Ford-Lincoln-Mercury dealer.

There were numerous other changes in Thomas' business operations from those of General Motors—its decision to lease automobiles [A. 256]; its customer installment financing [A. 314, 264]; its contractors [A. 314-5, 265]; its financing of new car purchases [A. 264]; its rates of pay [R. 496; A. 815, 266].

All of the foregoing matters considered together make it clear that the differences between Thomas and

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[6]In this respect the facts are almost exactly the opposite of those in *Texas Eastman Company*, (1969) 175 NLRB No. 105, 71 LRRM 1098 (Pet. 21). There *all* of the employees of the successor had been employees of the predecessor.

General Motors were so substantial that the question of whether the finding below that Thomas was not a "successor" to General Motors was supported by substantial evidence presents no ground for review by this Court.

As stated in the concurring opinion of the Board:

> "Furthermore, while it is true that the Respondents sell and service the same products as GM, their overall operations bear little resemblance to that of their predecessor. (Pet. Appx. B, p. 22)."

Conclusion.

The petition for a writ of certiorari is devoid of merit and should be denied.

Respectively submitted,

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